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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 240

JOSEPH COVELLO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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One point in the Government's Brief in Opposition to Certiorari requires a reply. For in opposing the grant of certiorari on the Petition's question 1 (a)—whether the term "trial of the case" in subsection (a) of the Jencks Act includes an evidentiary hearing on a pretrial motion—the Government suggests a construction of the Act which is in direct conflict with the majority opinion of this Court in *Palermo* v. *United States*, 360 U.S. 343 (1959).

In *Palermo* the Court held that the Jencks Act's "statutory procedures are exclusive" in determining

the producibility of a Government witness' prior statements. *Id.* at 351.

> "The purpose of the Act, its fair reading and its overwhelming legislative history compel us to hold that statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U.S.C. § 3500 cannot be produced at all." *Ibid.*

In the instant case, however, the Government contends that at a pretrial evidentiary hearing a Government witness' prior statement may be produced or withheld *in the Court's discretion.* (Brief in Opposition to Certiorari, pp. 8-10.)

If the courts below were correct in their holdings (80a; Pet. App. 14a)[1] that a hearing upon a pretrial motion to suppress is not "the trial of the case" within the meaning of subsection (a) of the Jencks Act, then the terms of subsection (a) expressly prohibit production at such a hearing of a Government witness' prior statement:

> "In any criminal prosecution brought by the United States, *no statement or report* in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection *until said witness has testified on direct examination in the trial of the case.*" 18 U.S.C. § 3500(a). (Emphasis supplied.)

[1] As in the Petition, record references are to the printed Appendix in the Court of Appeals, and the Court of Appeals' opinion is cited to the Appendix to the Petition for Certiorari.

Unless *Palermo* is to be overruled, the procedures delineated in the Jencks Act are mandatory. The Act requires production of the Government witness' relevant prior statement if his testimony at the suppression hearing is "direct examination in the trial of the case" and prohibits its production if the hearing testimony is not deemed part of "the trial of the case". *Palermo* precludes a district judge from exercising his discretion to order production of a statement whose production is not authorized by 18 U.S.C. § 3500(a).

Thus the Government's suggested construction of the Act to authorize discretionary production of Government witnesses' prior statements in itself raises an important question which should be the subject of consideration on certiorari. Whatever the merits of the Government's construction, *Palermo* should not be overruled or modified *sub silentio*.

The discretionary test for which the Government now contends to support the district judge's ruling is inappropriate for the further reason that the district judge did not apply it. The Government's apparent implication that he did apply it (see Brief in Opposition, pp. 8-9) is erroneous. The "records" which the Government notes were produced at the suppression hearing (Brief in Opposition, p. 8) were in no case sought under authority of the Jencks Act, or produced under its authority. Nor could they have been; none of them were reports or statements by the Government witness in question, Agent Neumann. Only with respect to Agent Neumann's reports[2] did

[2] An FBI agent's own report is a "statement" within the meaning of the Act. *Clancy* v. *United States*, 365 U.S. 312 (1961).

the district judge, Mansfield, J., consider applicability of the Jencks Act at the suppression hearing. Judge Mansfield's ruling was expressly based, not on the discretionary power for which the Government now contends, but on his construction of Section 3500(a):

> "The Court: Section 3500 refers to the witness testifying on direct examination in the trial of the case.
>
> I interpret that to mean—and I am referring to 3500(a)—the actual trial of the indictment.
>
> I don't construe a hearing on a motion to suppress to be a trial of the case, nor would I construe testimony of a witness on direct examination in the trial of the case to be the equivalent of the testimony of a witness on a motion to suppress. Therefore, I would deny the request for production of any material under 3500 here." (79a-80a.)

Had the district judge been employing a discretionary test such as the Government suggests, he could not have ruled the reports non-producible without even seeing what they contained. In ruling as he did without having seen the reports, which were "down in [the prosecutor's] office" (80a), the district judge plainly was not exercising a discretionary judgment but was construing the statute as a blanket prohibition against production of the reports at a pretrial hearing. Therefore, if the Government's discretionary test should be deemed correct, petitioner should at least be entitled to a remand for the purpose of having the district judge read the reports and exercise his discretion accordingly.

In the exercise of such discretion, it should not be assumed, as it apparently is by the Government (Brief

in Opposition, p. 10), that the district judge would be concerned only with Agent Neumann's reports of interviews Neumann had conducted with others following his alleged receipt of an "anonymous letter". The crucial reports for purposes of impeaching Agent Neumann's direct testimony would have been those reports of Neumann which related to his own activities rather than to his interviews of others. Agent Neumann in his direct testimony as a Government witness on the motion to suppress sought to negate any tainted leads by suggesting that his lead had come from "an anonymous letter" which accused Merrill Garfinkel of using phony telephone credit cards. (75a-77a.) But significantly, Neumann admitted that he had made no attempt to ascertain the author of this "anonymous letter". (85a.) Neumann's reports on his investigation of the phony credit card case—and there were 10 or 15 of them according to the prosecutor (80a)—would in all likelihood include references to the sources of his leads. Production of the reports might, for instance, have enabled the defense to explore on cross-examination whether the convenient "anonymous letter" was indeed from an "irate citizen" (542a), or perhaps from someone with tainted knowledge who was seeking to give Agent Neumann an independent source for otherwise tainted leads. The defense, not having seen the reports, can only speculate what they might contain. And the district judge, who was in the same position, should not be assumed to have based his ruling on speculation; he should under the Government's test be given the opportunity to see the reports on remand.

CONCLUSION

For the foregoing reasons and the reasons advanced in the Petition for Certiorari, it is respectfully submitted that the Petition should be granted.

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